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COORDINATION OF FEDERAL EQUAL EMPLOYMENT OPPORTUNITY PROGRAMS

OCTOBER 1, 1987 - SEPTEMBER 30, 1988

OFFICE OF THE LEGAL COUNSEL
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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OCTOBER 1, 1987 - SEPTEMBER 30, 1988

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OFFICE OF
THE CHAIRMAN

SEP 1 1989

The President of the United States
The President of the Senate
The Speaker of the House of Representatives

Dear Sirs:

In accordance with Section 715 of the Equal Employment Opportunity Act of 1972 and Section I-401 of Executive Order 12067, I am submitting a report of the Commission's interagency coordination activities for the period October 1, 1987-September 30, 1988.

This report describes continued progress toward meeting the major goals and mandates of these authorities: to provide leadership and coordination to all Federal agency equal employment programs; to promote uniformity, effectiveness and efficiency, and to eliminate duplication, overlap and inconsistency in these programs. Coordination efforts benefit both the general public and the Federal government. Actions to eliminate duplicative and inconsistent regulatory requirements help reduce the costs of compliance for employers and the government; more efficient use of Federal resources helps improve service to protected groups; improving the consistency and clarity of equal employment standards assists voluntary compliance with the law.

The Commission will continue to exercise its leadership role under Section 715 and Executive Order 12067 to assure that the Federal commitment to end employment discrimination is carried out with maximum effectiveness and efficiency.

Sincerely,

Clarence Thomas
Chairman

Enclosure

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INTRODUCTION

This report details activities of the Commission to achieve more effective coordination of Federal equal employment programs, as required by Section 715 of the Equal Employment Opportunity Act of 1972 and Executive Order 12067, [1] for the period from October 1, 1987 to September 30, 1988. The report describes progress toward meeting the major goals and mandates of these authorities: to eliminate duplication, overlap and inconsistency, and to promote uniformity, effectiveness and efficiency in Federal EEO programs.

The need for coordination of the growing number of Federal equal employment statutes, orders and regulations was recognized by the Congress in 1972. Section 715 of the Equal Employment Opportunity Act of 1972 established an Equal Employment Opportunity Coordinating Council with responsibility for:

> ...developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of ...departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies.

The Council, lacking staff and the authority of a lead agency, was unsuccessful in accomplishing its mission. Reorganization Plan No. 1 of 1978 transferred the Council's functions to the Equal Employment Opportunity Commission, and Executive Order 12067 directed the Commission to lead a coordinated program to develop uniform standards and procedures in Federal equal employment programs. Coordination is required for all rules, regulations, guidelines, policies and procedures, covering definitions of employment discrimination, investigation and compliance procedures, sharing of records, findings and documentation, data and recordkeeping requirements, training programs and publications. [2]

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[1] 43 Fed. Reg. 28967 (July 5, 1978); 3 C.F.R., 1978 Comp., p. 206. See Appendix A-1.

[2] The coordination function applies to external equal employment programs administered by Federal agencies, not to the program conducted by each agency for its own employees. The internal Federal equal employment program is coordinated through consultation with other agencies on policies, programs and

(continued...)

This report is divided into two sections:

I. Initiatives to Implement Coordination Objectives;

II. Coordination and Review of Federal Agency Equal Employment Issuances.

The Appendix contains documents related to coordination activities and a list of Federal agency equal employment issuances reviewed and coordinated during the year.

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[2](...continued)
issuances of the Equal Employment Opportunity Commission and the Office of Personnel Management.

I. INITIATIVES TO IMPLEMENT COORDINATION OBJECTIVES

A. Immigration Reform and Control Act of 1986:[1] Coordination With Department of Justice and General Accounting Office

The Immigration Reform and Control Act of 1986 (IRCA) was again a major focus of coordination activities during the year. Although the Commission has no enforcement responsibilities under IRCA, we have been involved in several IRCA related activities because of the potential that the substantial employer sanctions for hiring unauthorized aliens might lead to increased instances of national origin discrimination in employment. Title VII of the Civil Rights Act of 1964 provides the major source of protection from such discrimination.

IRCA imposes both civil and criminal sanctions against employers who knowingly hire unauthorized aliens after November 6, 1986. The law requires employers to request documents verifying the identity and legal employment status of all employees hired after that date. It also provides an opportunity for illegal aliens continuously residing in the United States since January 1982 to attain authorized status.

IRCA also prohibits discrimination in employment, on the bases of national origin or citizenship status. These anti-discrimination provisions supplement the coverage of Title VII. The Office of Special Counsel for Unfair Immigration-Related

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[1] Pub. L. No. 99-603 (November 6, 1986).

Employment Practices (OSC), Department of Justice (DOJ) enforces the anti-discrimination provisions. The Commission continued to work closely with OSC to assure that effective, consistent and nonduplicative procedures would be established for handling immigration-related discrimination complaints.

The Immigration and Naturalization Service (INS), DOJ enforces the employer sanctions and legalization provisions of IRCA. The Commission also continued to work closely with the INS to inform employers of the nondiscrimination requirements of Title VII and the relationship of Title VII's ban against national origin discrimination to IRCA.

The Commission collected information from EEOC field offices in areas with high alien populations on the information needed by employers and the general public in order to address the issue of national origin discrimination and the relationship between Title VII and IRCA. The Commission used this information to develop its own educational materials for employers and employees and job applicants stressing that national origin discrimination is unlawful and explaining the relationship between the two Acts.

In addition, the Commission provided year-long assistance to the General Accounting Office, which is directed by

the Act to monitor potential discriminatory effects of IRCA and to report annually to Congress on its findings.

1. Coordinating the Anti-Discrimination Provisions of IRCA and Title VII

The potential for employment discrimination on the bases of national origin or citizenship status caused by overreaction to the employer sanctions provisions of IRCA prompted Congress to specifically include anti-discrimination provisions in IRCA. [2] These provisions supplement and expand the prohibitions of Title VII and provide that there is to be no overlap in coverage of the two laws. Title VII prohibits discrimination on the basis of national origin by employers with 15 or more employees; IRCA extends this prohibition to employers with 4-14 employees. IRCA also prohibits discrimination, on the basis of citizenship status -- a basis not covered under Title VII -- by all employers with 4 or more employees. However, the employment practices subject to IRCA's anti-discrimination coverage are more limited than those covered by Title VII. IRCA prohibits discrimination in hiring, firing or recruitment or referral for a fee -- practices most likely to be affected by other requirements of the Act -- while Title VII covers these practices and all other terms and conditions of employment.

In April of 1988, the Commission signed an interim Memorandum of Understanding (MOU) with the Office of Special

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[2] 8 U.S.C. 1324b.

Counsel (OSC).[3] The purpose of the interim MOU between EEOC and OSC is to prevent any loss of rights arising from the operation of a filing deadline against a party who has mistakenly filed a charge with the wrong agency. The MOU makes each agency the agent of the other for the purpose of receiving charges and for the purpose of satisfying the time limits for filing charges. It also requires that each agency notify the other agency of the date of receipt when referring a charge. This agreement is to remain in effect pending completion of the negotiations on a final MOU, which were ongoing at the end of the year.

Pending completion of the negotiations on the final MOU, the Commission issued interim procedures for implementing the interim MOU. Instructions for referring files to the OSC, which were issued prior to the interim MOU, remained in effect, and additional guidance and instructions regarding the relationship between IRCA and Title VII and the handling of IRCA related charges were provided to the EEOC field offices. The instructions provide guidance on identifying, processing and referring charges to the OSC. Specifically, the instructions emphasize the need for precise recording of receipt dates since the interim MOU provides that charges which are timely but mistakenly filed with the wrong agency will be considered timely filed with the appropriate agency, under IRCA or Title VII.

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[3] 53 Fed. Reg. 15,904 (May 4, 1988).

2. Providing Information on the Immigration Act and Employment Discrimination

Two booklets concerning the relationship of Title VII and the Immigration Reform and Control Act of 1986 (IRCA) were approved by the Commission for publication. One booklet was targeted toward employers and the other toward applicants and employees. The booklets are titled "National Origin Discrimination is Unlawful: Employer's Obligations Under Title VII of the Civil Rights Act of 1964 and the 1986 Immigration Act" and "National Origin Discrimination is Unlawful: The Rights of Employees and Job Applicants Under Title VII of the Civil Rights Act of 1964 and the 1986 Immigration Act." Each was reviewed by the OSC before final Commission approval.

The booklet for employers provides guidance on how to avoid discrimination while implementing the procedures mandated by IRCA. Employers are cautioned not to overreact to the potential for sanctions by erecting barriers to the employment of individuals who look or sound foreign. The booklet also emphasizes that employers must apply the verification requirements of IRCA to every employee and applicant. Each employee and applicant must receive the same treatment and be subject to the same requirements and procedures. The booklet also provides questions and answers responding to the concerns most commonly raised by employers regarding the relationship between Title VII and IRCA.

The booklet for employees and job applicants explains what constitutes national origin discrimination under Title VII and IRCA. It describes the information applicants are required to provide under IRCA and identifies practices which would likely constitute employment discrimination. The booklet provides information on the process for filing charges of discrimination under Title VII and IRCA and provides addresses and telephone numbers for help in filing charges and obtaining additional information. It also contains a question and answer section responding to the most common concerns of employees and job applicants. Both booklets are expected to be published in the Spring of 1989.

3. Draft Policy Guidance on the Effect of IRCA on the Remedies Available to Undocumented Aliens Under Title VII

The Commission also drafted policy guidance on the effect of IRCA on the remedies available to undocumented aliens under Title VII. Title VII prohibits employment discrimination against any individual regardless of immigration status.[4] However, the ban on the hiring and continued employment of undocumented aliens after November 6, 1986 does place some limitations on the remedies available to undocumented aliens who were discriminatorily refused or denied employment after that date. The policy guidance is intended to preserve, to the fullest

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[4] EEOC Compliance Manual § 622.

extent consistent with IRCA, the remedies available to undocumented aliens under Title VII, thus insuring the continuing integrity of civil rights protection against national origin discrimination under Title VII. During the year, the policy guidance was circulated for internal review. We anticipate that a final policy guidance memorandum will be issued sometime next year.

4. Monitoring of Immigration Related Discrimination by the General Accounting Office

IRCA requires the General Accounting Office (GAO) to monitor and report to Congress annually, for three years, on evidence of a pattern of immigration related discrimination which was caused by the employer sanctions provisions of the Act.[5] Each GAO Report is reviewed by a Task Force composed of the Attorney General and the Chairmen of the EEOC and the U.S. Civil Rights Commission.

The Commission provided assistance to GAO throughout the year to implement this mandate. Quarterly reports on IRCA related charges were sent to GAO, and GAO staff visited EEOC field offices to review files on immigration related national origin discrimination charges. As of September 30, 1988, 148 IRCA related charges were reported by EEOC offices. Of these 64 were still being processed, and 84 were closed. The OSC

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[5] 8 U.S.C. 1324a.(j).

reported 286 charges, 89 of which had been closed. More than 70 other allegations of discrimination were reported to GAO by state and local agencies and a private legal organization.

In November 1988, GAO issued its second annual report on the implementation and impact of IRCA, including the anti-discrimination provisions. The report concluded that the available data did not establish a pattern of discrimination caused by employer sanctions, however, it did indicate an increase in IRCA related discrimination practices since the last report. It recommended that the OSC, in coordination with other agencies, develop a plan and budget to better educate the public about the anti-discrimination provisions of IRCA.

The Commission also consulted with the General Accounting Office on a survey that was sent to state and local human rights agencies to obtain information on unfair immigration related employment practices. Recommendations were provided to GAO to assure that the survey provided better information on practices that might cause discrimination. The results of this survey were included in the GAO's second annual report.

B. Implementing Rehabilitation Act Requirements
Guidance on Rehabilitation Act Issues

The Commission revised two proposed management directives, guidance originally drafted in 1983, on the issue of

reasonable accommodation under the Rehabilitation Act. These documents entitled "Reasonable Accommodation in Federal Employment of Handicapped Individuals"; and "Reasonable Accommodation in Employment of Handicapped Individuals under the Rehabilitation Act," were extensively revised to reflect current developments in case law and legislation. The directives are intended to provide guidance to federal agencies on specific aspects of equal employment opportunity requirements under Section 501 of the Rehabilitation Act of 1973 to further implement the Commission's responsibility for enforcing this statute in federal employment. Parallel guidance under Sections 503 and 504 of the Act was developed to assure consistent standards, as required by Executive Order 12067, in employment by federal contractors and grant recipients. The directives were still under internal review at the end of the year.

Two other proposed directives, "The Rights of Alcoholics Under the Rehabilitation Act of 1973" and "Guidance on the Definition of 'An Individual With Handicaps' Under Section 501 of the Rehabilitation Act of 1973 as Amended," as well as guidance on "Reassignment as a Reasonable Accommodation Under the Rehabilitation Act," reported in the Annual Report for FY 1987, were also under review at the end of the year.

C. Bulletin of EEO Issuances Under Development

The Commission continued publication of its semi-annual Bulletin of EEO Issuances Under Development. The Bulletin lists regulations and other policy issuances related to EEO that are under development by federal agencies. For each issuance, the name of the agency, title and type of issuance, policy objective, legal basis, current status, and a contact person are reported. In the two Bulletins published in FY 1988, agencies reported 87 issuances under development and 78 final issuances published. Eighty-eight of these issuances were regulations implementing Section 504 of the Rehabilitation Act of 1973 in agencies' federally conducted programs. Of these, 15 were proposed and 73 were final regulations. Twenty nine of these issuances provided policy or procedural guidance. EEOC itself reported 15 issuances under development.

D. Coordination in Collecting Employment Data

In conjunction with an agreement between EEOC and the Department of Labor (DOL), EEOC arranged for the mailout and processing of DOL's new "VETS-100" form as part of the 1988 Employer Information Report (EEO-1) survey. The new "VETS-100" report is required to be filed annually by federal contractors holding contracts of $10,000 or more, and provides information on

employment by job category and new hires of special disabled and Vietnam-era veterans. The form is similar to the EEO-1 report in format, definitions of job categories, hiring locations, reporting dates, and other requirements.

As part of the 1988 survey, the new form was mailed to more than 15,000 government contractors who employ at least 50 workers and have contracts amounting to $50,000 or more. Employers with smaller contracts of $10,000-$50,000, who are covered by the veterans' reporting requirements but are not required to file the EEO-1 report, were notified by DOL through published regulations of their obligation to obtain and file the new form. The entire survey consisted of almost 110,000 responses.

E. Coordination of EEO-6 Report

During the year, proposed revisions to the Commission's Higher Education Staff Information (EEO-6) report were coordinated with the Departments of Education, Justice, and Labor. The EEO-6 survey provides data on employment, salary, and new hires by race, gender, and ethnicity in specified job categories in higher education. The data are used in non-discrimination programs of these agencies, as well as by the EEOC. A major proposed revision concerned updating the salary intervals of the EEO-6 report to more accurately reflect current

earning levels than previous reports. The other agencies agreed with this and all other revisions to the EEO-6 survey, which will improve the reliability of the data collected. The revisions will be implemented, starting with the 1989 EEO-6 survey.

II. COORDINATION AND REVIEW OF FEDERAL EEO ISSUANCES

Coordination and review of federal agencies' proposed regulations and other equal employment opportunity issuances continued to be a major activity during FY 1988. Reviews were conducted of 28 issuances from 25 agencies. The actual number of reviews was higher because in some cases several drafts of a proposed issuance were reviewed. Except where other arrangements were negotiated with affected agencies, formal reviews of final issuances were completed within 15 workdays.

EEOC reviewed issuances from other federal agencies to ensure that they: (1) were derived from appropriate legal authority, consistent with Title VII of the Civil Rights Act of 1964 and with other relevant EEO laws and policy; (2) provided clear and effective guidance on legal requirements; and (3) did not impose duplicative or excessive burdens on employers.

A list of issuances reviewed and coordinated during this period is provided in the Appendix. Some examples of issuances and areas of review are summarized below.

A. Agency Issuances

1. Office of Special Counsel Interim Rule on Unfair Immigration Related Employment Practices [6]

The Commission reviewed and approved for publication a proposed interim final rule of the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC) which would amend the definition of who is a citizen or "intending citizen" protected from employment discrimination under section 102 of IRCA. [7] The amendment provided that aliens whose temporary resident status is approved are deemed to have been temporary residents from the date on which they paid their application fee.

The Commission found that the amendment was consistent with Congressional intent because it would clarify that protection for individuals applying for temporary resident status begins when they first make application, rather than at the point that the application is approved. The amendment was also intended to encourage aliens to apply for legalization by extending the anti-discrimination protection from the point of

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[6] The proposed rule amended 28 C.F.R. § 44.101(c)(2)(ii).

[7] 53 Fed. Reg. 48248 (November 30, 1988).

application rather than at the point of approval. Dating the temporary resident status from the point of application also made the OSC's policy with respect to anti-discrimination consistent with the Immigration and Naturalization Service policy, for other purposes, which recognizes temporary resident status as dating from the point that the application fee is paid.

2. Handicap Nondiscrimination Requirements in Federally Assisted Programs

The Commission reviewed a proposed final rule of the Department of Housing and Urban Development (HUD) implementing Section 504 of the Rehabilitation Act in its federally assisted programs. The Commission found that two changes in the proposed rule made since the Commission last reviewed the rule in 1986 departed from existing regulatory standards applicable to employment of handicapped persons. The proposed rule added the word "intentionally" to the section applicable to employment, so that it could have been construed to require proof of intentional discrimination against employees with handicaps. The Commission recommended deleting this word because the Supreme Court in Alexander v. Choate [8] confirmed that proof of intent is not required to find discrimination under § 504.

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[8] 469 U.S. 287 (1985).

The Commission also informed HUD that language in the section on "Remedial and Affirmative Action," which stated that "In the absence of discrimination, a recipient, in administering a program or activity covered by this part, should take affirmative action to overcome the effects of conditions which resulted in limiting the participation of qualified individuals with handicaps," was inconsistent with established standards. Instead, the Commission recommended that HUD retain language from the original Section 504 regulations issued by the Department of Health, Education and Welfare (HEW)[9] that have served as a model for other agencies' Section 504 regulations. The recommended language stated that: "A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons."

3. Handicap Nondiscrimination Requirements in Federally Conducted Programs

The Commission continued to coordinate employment provisions in proposed regulations implementing Section 504 of the Rehabilitation Act in agencies' federally conducted programs. Under the 1978 Amendments to the Act, each federal agency is required to issue Section 504 regulations prohibiting

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[9] These regulations, as adapted by the Department of Health and Human Services (HHS), are codified at 45 C.F.R. § 84.6(b).

discrimination on the basis of handicap in its own programs. During FY 1988, the Department of Agriculture, the Railroad Retirement Board and the Department of Commerce submitted proposed regulations implementing § 504 of the Rehabilitation Act with respect to their programs and activities.

The Commission found these proposed regulations to be consistent with the prototype regulations developed by the Department of Justice (DOJ), which includes employment provisions drafted by EEOC, and each was approved for publication. The prototype provides that the requirements for handicap nondiscrimination in EEOC's regulations implementing Section 501 of the Rehabilitation Act are applicable to federal employment under these Section 504 regulations.

The Commission also reviewed a final rule implementing § 504 of the Rehabilitation Act in the federally conducted programs of thirteen federal agencies. The Commission found the employment provisions of the rule to be generally consistent with the proposed rule it had reviewed during the previous year and approved it for publication.

4. Office of Personnel Management Regulations and FPM Guidance on Medical Qualifications Determinations

Commission staff completed formal reviews of several issuances of the Office of Personnel Management (OPM) related to nondiscrimination requirements of Title VII and

Section 501 of the Rehabilitation Act of 1973. The Commission completed its review of proposed revisions to OPM regulations and FPM guidance on Medical Qualification Determinations. [10] The documents were reviewed to assure that requirements of these issuances were consistent with and supported legal requirements for nondiscrimination and affirmative action in federal employment of individuals with handicaps. Because medical standards and physical requirements -- unlike other personnel policies -- operate to exclude people with disabilities, the Commission was particularly concerned that these medical requirements would be explained and administered with explicit reference to protection against discrimination and requirements for reasonable accommodation of qualified disabled persons.

The Commission recommended that OPM revise its regulations and guidance so that agencies would be properly advised of the relationship of OPM's medical qualification determinations and the Rehabilitation Act's requirements. Such clarification was needed to help agencies avoid unwitting violations of the Rehabilitation Act. The Commission also suggested that OPM consider adding provisions for its review of agencies' medical determinations that may abridge rights of individuals with handicaps. The recommendations of the Commission were adopted by the OPM and reflected in the proposed regulation

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[10] 5 C.F.R. Part 339; FPM Chapter 339.

published in the Federal Register[11] and in the FPM Chapter circulated to agencies for comment. A proposed final rule and FPM chapter reflecting these and further revisions were submitted for EEOC review at the end of the year.

5. Office of Personnel Management's Guidance on Promotion and Internal Placement

The Commission also made recommendations for changes in OPM's proposed revised FPM chapter on Promotion and Internal Placement [12] to assure consistency with Title VII requirements. The Commission's major concern was to assure that the section of this chapter on "Corrective Action in Discrimination Cases" reflected applicable Title VII standards including the Commission's newly revised regulatory requirements governing EEO complaint processing in federal agency employment.[13]

The language the Commission recommended for the section on "Corrective Action" was adopted by OPM and incorporated into a revised document and the Commission approved its publication.

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[11] 53 Fed. Reg. 9121 (March 21, 1988).

[12] FPM Chapter 335.

[13] 52 Fed. Reg. 41920 (October 30, 1987).

6. Revision of OPM Regulations on Selection and Testing [14]

The Commission reviewed a proposed revision to OPM's regulations on selection and testing. The proposed revision, reflecting changes resulting from the transfer of federal EEO authority to the EEOC in 1978 [15], removed certain employment practices appeals from the jurisdiction of the M.S.P.B. and deleted a detailed description of equal employment opportunity requirements from the existing rule. The revision also omitted any specific reference to appeals based on allegations of discrimination. The Commission expressed concern that these deletions might be misconstrued as an attempt to remove these employment practices from the reach of the equal employment opportunity complaint process. The Commission recommended language to clarify that appeals alleging discrimination should be filed under existing equal employment opportunity procedures. The Commission also made one other recommendation to clarify that the compliance with civil service requirements does not alone assure the absence of discrimination. The Commission commented that beyond these suggested revisions the proposed revision did not appear to conflict with Commission policy.

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[14] 5 C.F.R. Part 300, Subpart A.

[15] Reorganization Plan No. 1 of 1978, Section 3.

7. Proposed Section 504 Interim Compliance Manual of the Department of Housing and Urban Development

The Commission reviewed a proposed "Interim Compliance Manual for Low-Income Public Housing Programs Under Section 504 of the Rehabilitation Act of 1973, as amended" of the Department of Housing and Urban Development (HUD). Section 504, in part, prohibits discrimination on the basis of handicap by recipients of federal financial assistance. HUD is responsible for the enforcement of § 504 and for initiating compliance reviews of entities receiving financial assistance from the agency. The Manual was intended to provide interim guidelines to HUD staff on conducting compliance reviews of the programs and activities of low income public housing agencies. The Commission requested a number of changes in the sections relating to employment to more accurately reflect the requirements of § 504 and for consistency with § 504's requirements.

8. Revised Guidelines for Federal Statistical Activities of the Office of Management and Budget

The Commission strongly advised the Office of Management and Budget (OMB) against making proposed changes to Government-wide standards for race and ethnic data. OMB was warned that the revisions would damage the accuracy and existing consistency of data used by the EEOC and other agencies in efforts to eliminate discrimination. The Commission expressed concern regarding OMB's failure to consult with EEOC and other affected agencies as required by Executive Order 12067, prior to

publication of the proposed revision for public comment. Notice of Draft Circular Establishing Guidelines for Federal Statistical Activities, 53 Fed. Reg. 1542, 1552 (January 20, 1988). Pursuant to Executive Order 12067, the EEOC is responsible for assuring uniform recordkeeping and reporting requirements concerning employment under all federal agency programs. The Executive Order and the Commission's implementing regulations require that all agencies consult and coordinate with the Commission in the development of data collection and recordkeeping instruments.

As part of a comprehensive revision of existing Guidelines for Federal Statistical Activities, OMB proposed to replace an existing detailed directive providing government-wide standards for recordkeeping, collection and maintenance of race and ethnic data [16] with a few brief paragraphs of instructions. The Commission recognized OMB's effort to reduce lengthy guidance but pointed out several serious problems with this proposal:

- The revision would eliminate definitions describing the specific groups to be included under each of 5 basic race and ethnic categories; without these definitions there would be considerable inconsistencies in reported data;

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[16] Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19260 (1978).

- OMB proposed to add a new category, titled "Other," but would not require further identification of a particular group. This would prevent aggregation of data into the 5 basic categories;

- The revision would eliminate important instructions that enable proper counting of Hispanic persons and allow these individuals to identify as "Black" or "White" without double counting.

The Commission urged OMB to retain key sections of the existing Directive in order to provide clear and consistent guidance to federal agencies. The Commission's concerns about the proposed revisions were shared by many other commentators. A special report prepared for the Joint Economic Committee of Congress summarized the EEOC's recommendations and also reported that members of Congress, civil rights agencies and civil rights groups argued that "elimination of race and ethnic definitions and addition of an 'other' category would adversely affect civil rights enforcement and affirmative action programs." [17] At the end of the year OMB was reviewing the comments on its proposals.

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[17] Congressional Research Service, Library of Congress, OMB's Proposed Guidelines for Federal Statistical Activities, prepared for Joint Economic Committee, August 5, 1988, pp. 5, 18.

9. "Fringe Benefit" Provisions of Title IX Regulation

The Commission continued its review of the fringe benefit provisions of the Department of Education's (ED) regulation which implements Title IX of the Education Amendments of 1972. This section of the regulation is being amended to conform to the Supreme Court decisions in Los Angeles Department of Water and Power v. Manhart [18] and Arizona Governing Committee v. Norris[19].

As originally drafted the rule had required equal periodic benefits for members of each sex as required by Norris and equal employee contributions as required by Manhart but it had also required equal employer contributions to the plans. Neither Manhart nor Norris addressed the issue of equal employer contributions. The Department of Justice agreed with the Commission's recommended revision of the proposed rule, to require only that recipients provide equal benefits and equal employee contributions to pension plans for both sexes. However, the issue of the appropriate date for equalization of benefits and contributions remained under consideration and discussions between DOJ and the EEOC were ongoing at the end of the year.

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[18] 435 U.S. 702 (1978).

[19] 463 U.S. 1073 (1983).

10. Office of Federal Contract Compliance Programs Directive on Corporate Level Selection Decisions

The Commission reviewed and approved a draft directive from the Office of Federal Contract Compliance Programs (OFCCP) on Corporate Level Selection Decisions. The directive required that upper and middle level management positions be listed on the affirmative action plan (AAP) of the location which exercises control of the placement determinations for such positions, rather than, as was the practice of many contractors, on the AAP of the local establishment where the job is actually performed. The purpose of this policy was to assure the development of appropriate placement plans and effective monitoring of minority and female representation in these positions. The directive was intended to formalize the longstanding general policy of the OFCCP of placing job titles in the AAP of the establishment where employment decisions are made. The Commission approved the directive for distribution to OFCCP field staff because it raised no policy concerns.

11. OFCCP's Revised Compliance Manual

Commission staff conducted an extensive review of a revised Compliance Manual of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The manual provides guidance to OFCCP staff on policies and procedures for the enforcement of Executive Order 11246, which prohibits discrimination against minorities and women and requires

affirmative action by federal contractors. It also provides guidance for similar requirements affecting individuals with handicaps under Section 503 of the Rehabilitation Act of 1973 and Vietnam era and special disabled veterans under the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

The revised Manual did not contain new policies or procedures, but rather consolidated into one document directives and policy guidance that had been issued during the 10 years since OFCCP's existing Compliance Manual was issued in 1978. Because most federal contractors covered by Executive Order 11246 are also covered by Title VII, it was essential that the Executive Order guidance in the Manual be consistent with Title VII principles.

The Commission's review of the Compliance Manual and a detailed Compliance Review Report Form led to a number of recommendations for modifications to assure consistent principles for identification and remedy of discrimination. Revisions or additions recommended included the following:

- Further clarification of certain Title VII legal principles, such as appropriate pools for comparison under the disparate treatment and disparate impact theories of

discrimination, and appropriate remedies available for discrimination;

- Added guidance on other Title VII standards, particularly those established in EEOC guidelines on sex discrimination and religious and national origin discrimination, where existing OFCCP guidelines are not as comprehensive as, or focus on different issues than those of EEOC;

- Revisions to reflect current legal standards regarding statistical measures of discrimination;

- Added requirements for data collection by disaggregated race/ethnic groups, to provide more accurate measures of possible discrimination, rather than requesting such data only for "minorities" and "women" at several stages of OFCCP's investigative and compliance process.

In response to OFCCP's concern for speedy issuance of long-delayed revisions to its Manual, the Commission conducted its review of the complex document under expedited procedures, in

close consultation with OFCCP staff. Formal recommendations for revisions were transmitted at the end of the fiscal year and OFCCP indicated that these recommendations would be incorporated in the Manual.

APPENDIX

[3195-01]

Executive Order 12067 June 30, 1978

Providing for Coordination of Federal Equal Employment Opportunity Programs

By virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 FR 19807), it is ordered as follows:

1-1. *Implementation of Reorganization Plan.*

1-101. The transfer to the Equal Employment Opportunity Commission of all the functions of the Equal Employment Opportunity Coordinating Council, and the termination of that Council, as provided by Section 6 of Reorganization Plan Number 1 of 1978 (43 FR 19807), shall be effective on July 1, 1978.

1-2. *Responsibilities of Equal Employment Opportunity Commission.*

1-201. The Equal Employment Opportunity Commission shall provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. It shall strive to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the Federal departments and agencies having responsibility for enforcing such statutes, Executive orders, regulations and policies.

1-202. In carrying out its functions under this order the Equal Employment Opportunity Commission shall consult with and utilize the special expertise of Federal departments and agencies with equal employment opportunity responsibilities. The Equal Employment Opportunity Commission shall cooperate with such departments and agencies in the discharge of their equal employment responsibilities.

1-203. All Federal departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this order and shall furnish the Commission such reports and information as it may request.

1-3. *Specific Responsibilities.*

1-301. To implement its responsibilities under Section 1-2, the Equal Employment Opportunity Commission shall, where feasible:

(a) develop uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity;

(b) develop uniform standards and procedures for investigations and compliance reviews to be conducted by Federal departments and agencies under any Federal statute, Executive order, regulation or policy requiring equal employment opportunity;

(c) develop procedures with the affected agencies, including the use of memoranda of understanding, to minimize duplicative investigations or compliance reviews of particular employers or classes of employers or others covered by Federal statutes, Executive orders, regulations or policies requiring equal employment opportunity;

(d) ensure that Federal departments and agencies develop their own standards and procedures for undertaking enforcement actions when compliance with equal employment opportunity requirements of any Federal statute, Executive order, regulation or policy cannot be secured by voluntary means;

(e) develop uniform record-keeping and reporting requirements concerning employment practices to be utilized by all Federal departments and agencies having equal employment enforcement responsibilities;

(f) provide for the sharing of compliance records, findings, and supporting documentation among Federal departments and agencies responsible for ensuring equal employment opportunity;.

(g) develop uniform training programs for the staff of Federal departments and agencies with equal employment opportunity responsibilities;

(h) assist all Federal departments and agencies with equal employment opportunity responsibilities in developing programs to provide appropriate publications and other information for those covered and those protected by Federal equal employment opportunity statutes, Executive orders, regulations, and policies; and

(i) initiate cooperative programs, including the development of memoranda of understanding between agencies, designed to improve the coordination of equal employment opportunity compliance and enforcement.

1-302. The Equal Employment Opportunity Commission shall assist the Civil Service Commission, or its successor, in establishing uniform job-related qualifications and requirements for job classifications and descriptions for Federal employees involved in enforcing all Federal equal employment opportunity provisions.

1-303. The Equal Employment Opportunity Commission shall issue such rules, regulations, policies, procedures or orders as it deems necessary to carry out its responsibilities under this order. It shall advise and offer to consult with the affected Federal departments and agencies during the development of any proposed rules, regulations, policies, procedures or orders and shall formally submit such proposed issuances to affected departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall use its best efforts to reach agreement with the agencies on matters in dispute. Departments and agencies shall comply with all final rules, regulations, policies, procedures or orders of the Equal Employment Opportunity Commission.

1-304. All Federal departments and agencies shall advise and offer to consult with the Equal Employment Opportunity Commission during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity. Departments and agencies shall formally submit such proposed issuances to the Equal Employment Opportunity Commission and other interested Federal departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall review such proposed rules, regulations, policies, procedures or orders to ensure consistency among the operations of the various Federal departments and agencies. Issuances related to internal management and administration are exempt from this clearance process. Case handling procedures unique to a single program also are exempt, although the Equal Employment Opportunity Commission may review such procedures in order to assure maximum consistency within the Federal equal employment opportunity program.

1-305. Before promulgating significant rules, regul ons, policies, procedures or orders involving equal employment opportunity, the Commission and affected departments and agencies shall afford the public an opportunity to comment.

1-306. The Equal Employment Opportunity Commission may make recommendations concerning staff size and resource needs of the Federal departments and agencies having equal employment opportunity responsibilities to the Office of Management and Budget.

1-307. (a) It is the intent of this order that disputes between or among agencies concerning matters covered by this order shall be resolved through good faith efforts of the affected agencies to reach mutual agreement. Use of the dispute resolution mechanism contained in Subsections (b) and (c) of this Section should be resorted to only in extraordinary circumstances.

(b) Whenever a dispute which cannot be resolved through good faith efforts arises between the Equal Employment Opportunity Commission and another Federal department or agency concerning the issuance of an equal employment opportunity rule, regulation, policy, procedure, order or any matter covered by this Order, the Chairman of the Equal Employment Opportunity Commission or the head of the affected department or agency may refer the matter to the Executive Office of the President. Such reference must be in writing and may not be made later than 15 working days following receipt of the initiating agency's notice of intent publicly to announce an equal employment opportunity rule, regulation, policy, procedure or order. If no reference is made within the 15 day period, the decision of the agency which initiated the proposed issuance will become effective.

(c) Following reference of a disputed matter to the Executive Office of the President, the Assistant to the President for Domestic Affairs and Policy (or such other official as the President may designate) shall designate an official within the Executive Office of the President to meet with the affected agencies to resolve the dispute within a reasonable time.

1-4. *Annual Report.*

1-401. The Equal Employment Opportunity Commission shall include in the annual report transmitted to the President and the Congress pursuant to Section 715 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-14), a statement of the progress that has been made in achieving the purpose of this order. The Equal Employment Opportunity Commission shall provide Federal departments and agencies an opportunity to comment on the report prior to formal submission.

1-5. *General Provisions.*

1-501. Nothing in this order shall relieve or lessen the responsibilities or obligations imposed upon any person or entity by Federal equal employment law, Executive order, regulation or policy.

1-502. Nothing in this order shall limit the Attorney General's role as legal adviser to the Executive Branch.

Jimmy Carter

THE WHITE HOUSE,
June 30, 1978

[FR Doc. 78-18686 Filed 6-30-78; 4:23 pm]

federal register

Tuesday
October 14, 1980

Part V

Equal Employment Opportunity Commission

Coordination of Federal Equal Employment Opportunity Programs; Final Regulations

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1690

Coordination of Federal Equal Employment Opportunity Programs

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final regulations.

SUMMARY: These regulations implement the obligations outlined in Sections 1–303 and 1–304 of Executive Order 12067 (Providing for Coordination of Federal Equal Employment Opportunity) (43 FR 28967) which require that Federal agencies consult and coordinate with EEOC in the development of rules, regulations, policies, procedures or orders dealing with equal employment opportunity. These regulations outline the means by which the consultation and coordination shall occur between the EEOC and Federal agencies.

EFFECTIVE DATE: October 14, 1980.

FOR FURTHER INFORMATION CONTACT: Francesta E. Farmer, Director, Office of Interagency Coordination, Room 4208, Equal Employment Opportunity Commission, 2401 "E" Street, NW., Washington D.C. 20506, (202) 634–6916.

SUPPLEMENTARY INFORMATION: On September 28, 1979, EEOC published (44 FR 55907) proposed regulations to meet the obligations outlined in Section 1–304 of the Order and invited comments from the public. The regulations were revised in light of the public comment and sent to Federal agencies on March 6, 1980 with a 15 working day notice of intent to publish in final. Three major agencies and the Equal Employment Advisory Council responded to the September publication. Twenty-six agencies responded to the March 6 fifteen day notice, the last letter arriving on June 4. Most agencies did not offer substantive comments and agreed with the proposal.

The numbering system used in these regulations was changed since the September publication to allow them to be placed in the Code of Federal Regulations and in EEOC's Management Directives System as well. For purposes of this discussion, parts of these regulations are referred to here only by the last part of the citation, e.g., Sec. 305. Here, we present the changes made since the September publication.

Coverage

The Office of Personnel Management (OPM) took the position that it was covered by the Executive Order but not by these regulations on the theory that the regulations only covered agencies which enforced EEO regulations. OPM claimed to be only a policy development agency and not an enforcement agency. However, in light of several of OPM's enforcement responsibilities, including enforcement of the Federal Equal Employment Opportunity Recruitment Program, the enforcement of reporting requirements on government agencies in the management of the Civilian Personnel Data File, the program for the selective placement of the handicapped in Federal employment, and a primary role in the enforcement of the Intergovernmental Personnel Act of 1970, and the Standards for a Merit System of Personnel Administration for State and local agencies, we conclude that OPM's responsibilities are within the ambit of those contemplated to require coverage under these regulations.

Issuance

Three of the major agencies (DOL, HEW, and E.D.) have suggested that it would be burdensome for EEOC to obligate itself to make all determinations of whether issuances are exempt from coordination on the basis of their being internal management and administration documents. In the interest of easing the burden on the agencies and the EEOC in deciding what is covered we have modified the defintion of issuance (Sec. 107(f)) by deleting the words "but is not limited to", in response to suggestions by the above agencies.

OPM and HEW suggested that "issuance" be limited such that it not cover items such as publications which reflect ideas that appear in already agreed upon rules and regulations. However, the Order (Section 1–301(h)) mandates that EEOC assist the agencies in the development of appropriate publications. The labor Department similarly requested that data collection or recordkeeping instruments be eliminated from the list of items which must be submitted as issuances. Here, too, the Order (Section 1–301(e)) requires that EEOC develop uniform recordkeeping and reporting requirements to be utilized by all Federal departments and agencies having equal employment enforcement responsibilities in that this is a major area of potential duplication, overlap, and inconsistency.

Internal Management and Administration Exemption

The Department of Labor also suggested that we broaden the scope of the term "Internal or Administrative Documents" (Sec. 107(e)) by deleting language referring to form letters and substitute "correspondence which does not transmit significant new policy interpretations or program standards having an impact upon other Federal agencies." This language was adopted because it will eliminate the impression of requiring an agency to consult with EEOC before sending out any correspondence which interprets policy or enunciates established policy and standards. Finally, the regulations (Sec. 301(d)) have been changed to indicate that we expect the agencies to make the initial determination of what is a covered issuance and that they will involve EEOC only in those instances when there is doubt.

HUD indicated that EEOC should allow room in its definition of "Internal or Administrative Document" for coverage of program evaluation and program accountability in the coordination process such that when two divisions within an agency with related equal employment opportunity monitoring or enforcement responsibilities disagree on their respective roles, EEOC could (on request) mediate. EEOC's view is that while we are willing, in some circumstances, to assist agencies on intra-agency disagreements, such disagreements are not interagency and therefore not matters subject to the coordination process.

Affected Agency

The Federal Deposit Insurance Corporation pointed out that the definition of "affected agency" contained a reference to the definition of "agencies", thus limiting the definition of "affected agency" to those agencies having responsibility for EEO programs. The reference was not intended to create such a limitation and it has been removed from the definition of "affected agencies." The result is to clarify that agencies other than those with EEO programs will, for example, receive pre-publication notice of issuances under development and will have recourse to the dispute resolution mechanism in Section 1–307 of the Order.

Significant Issuance

It was requested by OPM that EEOC identify the mechanism for receiving public comment on significant issuances. Sections 304(a) (3) and (4) have been modified to indicate the opportunity provided for public comment on significant issuances.

Agency Component

OPM suggested that we drop the definition of "Agency Component" since it was not used in the regulations except in the definition of "Agencies" (Sec.

107(b)). We agree that the term is self-explanatory and have dropped it.

Publication

OPM suggested that we define the term "Public Announcement" (Sec. 107(h)) instead of "Publication" since the former appears in the Order. This suggestion has been adopted.

Notification to EEOC

The Department of Labor urged a return to the language of the September publication which merely *suggested* that agencies notify EEOC upon their intention to develop an issuance (Sec. 301(a)). The Order demands otherwise: Section 1-304 of the Order requires that all Federal agencies *"shall* advise and offer to consult with the Equal Employment Opportunity Commission during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity." (emphasis added).

DOL has also suggested a modification of Sec. 301(a) such that only significant issuances and issuances affecting another agency would trigger the requirement to notify EEOC. DOL has also suggested that agencies should only be required to supply early drafts (Sec. 301(b)) *of significant* issuances. These suggestions are inconsistent with the requirement that the agencies consult, not only on significant issuances, but also on policies and procedures including data collection and recordkeeping instruments and publications. Accordingly, EEOC has developed a system of notification of issuances under development in the form of a Management Directive. It calls for Quarterly Reports to EEOC by the agencies and a Quarterly Bulletin by EEOC to the agencies. This system is intended to assist EEOC and other Federal agencies with equal employment opportunity responsibilities to comply with the requirements in Sections 1-303 and 1-304 of Executive Order 12067. These sections require that EEOC and other Federal agencies "advise and offer to consult with affected Federal agencies during the development" of equal employment opportunity issuances.

Extension of Time for Consultation

When an initiating agency has denied requests by affected agencies for additional time to review a proposed issuance during the consultation period, the affected agency may appeal to the EEOC for additional time (Sec. 304(a)(2)). If the EEOC grants additional time, it will inform the initiating agency and the requesting agency of its decision. The Department of Labor has suggested that when the EEOC grants additional time, that it give the initiating agency reasons for overturning its denial. This suggestion has been adopted because it will provide guidance to the agencies on such questions and in the long run may reduce the number of occasions when such requests will come to EEOC.

Coordination Among Lead Agencies

It was suggested by OPM that where lead agencies have already been designated in certain policy areas (handicapped, for example), EEOC should work directly with the lead agency to relieve the initiating agency from having to work with two coordination agencies. EEOC is always the lead agency where there are employment issues; however, it has always been EEOC's policy to work with other lead agencies on issues of mutual concern so that an initiating agency need not mediate between two lead agencies.

Agency Review Before Public Comment

OPM has suggested eliminating the 15 working day review period prior to publication for public comment (Sec. 304(a)(1)). The Executive Order, however, requires that

"* * * Departments and agencies shall formally submit such proposed issuances to the Equal Employment Opportunity Commission and other interested Federal departments and agencies at least 15 working days prior to public announcement * * *".

Public Comment on Significant Issuances

We have adopted OMB's suggestion to clarify that agencies must allow at least 60 days for adequate public comment on significant issuances (Sec. 304(a)(3)). This is consistent with the requirements imposed by Executive Order 12044 (Improving Government Regulations, 43 FR 12661 (March 24, 1978)

Highlighting Changes Subsequent to Public Comment

We have adopted the suggestion by the Treasury Department to require that agencies highlight changes made by the initiating agency in issuances forwarded to EEOC with the 15 day notice of intent to publish in final (Sec. 304(b)). This will facilitate review by EEOC and the other affected agencies.

Nondisclosure of Proposed Issuances

A discussion of limitations on disclosure has been added and other language has been deleted from Sec. 305 of the regulations in response to DOL's

concern. Section 305, according to DOL and HUD, was not clear on the issue of when proposed issuances would be made public. DOL was particularly concerned that the initiating agency be assured the right to be the first to make public proposed issuances which are submitted to EEOC with a 15 day notice of intent to publish in final. DOL's comment is consistent with Section 1-304 of the Order which provides that "Departments and agencies shall formally submit such proposed issuances to the Equal Employment Opportunity Commission and other interested Federal departments and agencies at least 15 working days *prior to public announcement* * * *" (emphasis added). This means that the initiating agency shall be the agency to make the proposed issuance public. EEOC would not make proposed issuances public simply because the initiating agency indicated an *intent* to do so.

Compliance with this request raises several issues pertaining to disclosure requirements. The Sunshine Act, with certain exceptions, obligates the EEOC to hold open meetings in its decisionmaking process. The Freedom of Information Act requires that except for specified exemptions, documents in the possession of a government agency shall be made available to the public, on request.

However, as the Administrative Conference of the United States indicates in a 1978 Interpretative Guide to the Sunshine Act:

> A question has been raised as to whether an agency would be able to assert (9)(B) in order to protect a proposed action of another agency. Although the situation may not have been in the contemplation of the drafters, the Act seems to permit it, and nothing in the policy underlying exemption (9)(B) requires a different result. The agency closing the meeting would, of course, have to make its own determination as to the likelihood of harm from opening the meeting and as to public interest in an open meeting.

Similarly, EEOC's Freedom of Information Act regulations, at 29 CFR 1610.6, provide that:

> Requests for records that originated in another Agency and are in the custody of the Commission, will be coordinated in appropriate circumstances with that Agency, and the person submitting the request shall be so notified. The decision made by that Agency with respect to such records will be honored by the Commission.

Thus, Section 305 of this regulation comports with the concerns of DOL and complies with the Sunshine Act and the Commission's Freedom of Information Act regulation.

Temporary Waivers

DOL has suggested that the tone of Section 307 could be improved by not requiring written certification of EEOC's right to review documents which have been granted a temporary waiver. With respect to the same section, Treasury recommended the addition of language indicating that the comments of other affected agencies, in addition to those of EEOC, could result in changes to a proposed issuance. Both recommendations have been accepted.

Notice of Unresolved Disputes

DOL interpreted Section 308 as suggesting that agencies would have to have the concurrence of EEOC before referring a dispute to the Executive Office of the President. This was not the intention of this section. Rather it was the intention to give the initiating agency ample opportunity to resolve disputes by having them framed in writing, by the affected agency, so that the disputes may be clearly understood and discussed prior to such referral. We conclude that the prior notice requirement is a minimal requirement and consistent with EEOC's mandate to facilitate full discussion of controversial issues.

Treasury has requested that the "reasonable time" allowed agencies to resolve disputes be defined. Given that disputes may only be referred during the 15 day notice of intent to publish in final, it would not seem necessary to further define that term.

Recordkeeping and Reporting Requirements

OMB pointed out that the Federal Reports Act of 1942 requires that certain recordkeeping and reporting requirements cannot become effective without OMB approval. Clearance of an EEO recordkeeping and reporting requirement by EEOC under the Order does not, of course, substitute for OMB clearance.

This regulation is the first in a series of such issuances under EEOC's Executive Order 12067 authority. As experience dictates, we will issue additional written interpretations or amendments of these Executive Order regulations. Accordingly, the EEOC is adding 29 CFR Part 1690 as set forth below.

Signed at Washington, D.C., this 8th day of October, 1980.

For the Commission.
Eleanor Holmes Norton,
Chair.

PART 1690—PROCEDURES ON INTERAGENCY COORDINATION OF EQUAL EMPLOYMENT OPPORTUNITY ISSUANCES

Subpart A—General

Sec.
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Subpart B—Responsibilities

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Subpart C—Policies and Procedures

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1690.306 Formal submission in absence of consultation.
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1690.309 Interpretation of the order.

Subpart D—Reporting Requirements

1690.401 Reporting requirements.

Authority: Sec. 715 of Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e–14); Reorganization Plan No. 1 of 1978, 43 FR 19807; E.O. 12067, 43 FR 28967.

Subpart A—General

§ 1690.101 Subject.

Procedures on Interagency Coordination of Equal Employment Opportunity Issuances.

§ 1690.102 Purpose.

These regulations prescribe the means by which review and consultation shall occur between the Equal Employment Opportunity Commission and other Federal agencies having responsibility for enforcement of Federal statutes, Executive Orders, regulations and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. Subsequent regulations will expand on standards for the coordination of specific matters referenced or alluded to herein.

§ 1690.103 Supersession.

None. These regulations are the first in a series of instructions issued by EEOC pursuant to its authority under Executive Order 12067.

§ 1690.104 Authority.

These regulations are prepared pursuant to the Equal Employment Opportunity Commission's obligation and authority under Section 1–303 and 1–304 of Executive Order 12067 (Providing for Coordination of Federal Equal Employment Opportunity Programs) 43 FR 28967, July 5, 1978. (These regulations will also appear as EEOC Management Directive No. 1000).

§ 1690.105 Policy intent.

These procedures will govern the conduct of such agencies in the development of uniform standards, guidelines and policies for defining discrimination, uniform procedures for investigations and compliance reviews and uniform recordkeeping and reporting requirements and training programs. These procedures will also facilitate information sharing and programs to develop appropriate publications and other cooperative programs. The goals of uniformity and consistency are to be achieved with the maximum participation and review on both an informal and formal basis by the relevant Federal agencies and, finally, by the public.

§ 1690.106 Scope.

These regulations apply to Federal agencies having equal employment opportunity program responsibilities or authority other than equal employment responsibilities for their own Federal employees or applicants for employment. Its provisions do not apply to issuances related to internal management or administration of the agency.

§ 1690.107 Definitions.

(a) "Affected Agency" means any agency whose programs, policies, procedures, authority or other statutory mandates (including coverage of groups of employers, unions, State and local governments or other organizations mandated by statute or Executive Order) indicate that the agency may have an interest in the proposed issuance.

(b) "Agencies" means those Executive and independent agencies, agency components, regulatory commissions, and advisory bodies having equal employment opportunity program responsibilities or authority other than equal employment opportunity responsibilities for their own Federal employees.

(c) "Consultation" means the exchange of advice and opinions on a subject occurring among the EEOC and affected agencies before formal submission of the issuance.

(d) "Formal Submission" means the transmittal of a written, publication-ready document by the issuing agency to the EEOC and other affected agencies for at least 15 working days from date of receipt. The formal submission shall take place before the publication of any issuance as a final document.

(e) "Internal or Administrative Documents", pursuant to 1-304 of the Order, may include, but are not limited to forms for internal audit and recordkeeping; forms for performance and program evaluation; internal directives dealing with program accountability; routine intra-agency budget forms; intra-agency agreements; correspondence which does not transmit significant new policy interpretations or program standards having an impact upon other Federal agencies; tables of organization; and other documents setting forth administrative procedures for the conduct of programs. Internal or administrative documents do not include compliance manuals, training materials, publications or any other internal documents setting forth procedures for the resolution of complaints, standards of review or proof, or any other policies, standards or directives having implications for non-Federal employees.

(f) "Issuance" refers to any rule, regulation, guideline, order, policy directive, procedural directive, legislative proposal, publication, or data collection or recordkeeping instrument. It also includes agency documents as described above, or revisions of such documents, developed pursuant to court order. "Issuance" does not include orders issued to specific parties as a result of adjudicatory-type processes.

(g) "Order" means Executive Order 12067 (Providing for Coordination of Federal Equal Employment Opportunity Programs).

(h) "Public Announcement" means the publication of a document in final form in the Federal Register or to any other promulgation for general agency or public reference.

(i) "Significant Issuance" means any issuance which the public must be afforded an opportunity to comment upon. In determining whether an issuance is significant, the EEOC shall apply the following criteria:

(1) The type and number of individuals, businesses, organizations, employers, labor unions, or State and local governments affected;

(2) The compliance and reporting requirements likely to be involved;

(3) The impact on the identification and elimination of discrimination in employment;

(4) The relationship of the proposed issuance to those of other programs and agencies.

Subpart B—Responsibilities

§ 1690.201 Responsibilities.

(a) The Director of the Office of Interagency Coordination (OIC) is responsible for coordinating the consultation and review process with other agencies on any issuances covered by the Order.

(b) All Federal agencies shall advise and offer to consult with the EEOC during the development of any proposed issuances, concerning equal employment opportunity which affect the obligations of employers, labor organizations, employment agencies or other Federal agencies.

(c) The Equal Employment Opportunity Commission shall advise and offer to consult with the affected Federal agencies during the development of any proposed issuances concerning equal employment opportunity which affect the obligations of employers, labor organizations, employment agencies or other Federal agencies.

Subpart C—Policies and Procedures

§ 1690.301 Notification to EEOC during development of issuances.

(a) Agencies shall notify the Commission whenever they intend to develop a significant issuance or an issuance affecting other agencies so that potential duplication, overlap, or inconsistency with the proposed issuances of other agencies can be identified before substantial agency time and resources have been expended. The requirement for consultation applies whether or not the agency plans to publish the issuance in the Federal Register for public comment.

(b) Whenever an agency of the Federal government (initiating agency) develops a proposed issuance which will require consultation among the affected agencies, a responsible official of that agency or agency component shall initiate consultation by submitting an early draft of the appropriate documents, preferably after review at the first or second supervisory level, to the chair of the EEOC (ATTN: Director, OIC). The submission shall be made prior to the point that the issuance is deemed final and ready for publication and shall indicate the appropriate office or person responsible for development of the issuance.

(c) EEOC recognizes that subsequent intra-agency clearance activities may change the policies outlined in the

issuance and may add or delete items included in prior drafts. Therefore, during this period of policy development, an initiating agency shall not be bound by the contents of drafts which precede the final draft.

(d) Except as provided in Section 1690.307, in no instance shall there be formal submission to the EEOC or the affected agencies without prior consultation pursuant to Section 1-304 of the Order.

(e) Where an agency issuance is related to the internal management or administration of the agency, the issuance is exempt from the consultation process under the Order. The initiating agencies will make the determination of what must be submitted. When the agencies are in doubt, EEOC will determine the extent to which a particular issuance is covered by this exemption.

§ 1690.302 Issuances Proposed by EEOC.

Whenever the EEOC proposes to develop a significant issuance or any issuance requiring consultation, the procedure outlined in these regulations, shall also apply, as set forth in Section 1-303 of the Order. The EEOC shall advise and consult with other affected agencies whenever it develops an issuance, in the same manner and to the same extent as other agencies are required to do in § 1690.301 above and in other sections below.

§ 1690.303 Consultation with affected agencies.

At the start of consultation, the EEOC shall determine which other agencies would be affected by the proposed issuance, and the initiating agency shall consult with such agencies. Initiating agencies shall also consult with other agencies which claim that their internal equal employment opportunity or personnel programs are affected by proposed issuances otherwise directed at external equal employment opportunity efforts. Agencies may consult with any other agencies that they believe would be affected by the issuance. The consultation period shall be determined by the parties. During the consultation period, the EEOC shall seek to resolve any disputes with the initiating agency before publication

§ 1690.304 Coordination of proposed issuance.

(a) *Procedure for publication of proposed issuance.* (1) If the initiating agency, after consultation with EEOC, proposes to publish the issuance for purposes of receiving comments from the public, it shall confer with EEOC and agree on a mutually agreeable length of time, no less than 15 working days, during which the proposal shall be submitted to all affected Federal agencies pursuant to Section 1-304 of the Order. The period of review shall be sufficient to allow all affected agencies reasonable time in which to properly review the proposal.

(2) When an affected agency wishes an extension of the review period, it shall make such request of the initiating agency. If the initiating agency does not grant the request, the affected agency may then make that request of EEOC. EEOC may, at its discretion, grant the additional time requested, whereupon EEOC will inform the initiating agency which shall extend the review period. EEOC shall also inform the initiating agency of the reasons for the extension.

(3) After 15 working days, if the EEOC has not requested an extension of time or otherwise communicated the need for more time to review the proposal, the initiating agency may proceed to publication of the proposed significant issuance for public comment for at least 60 days.

(4) During this public comment period, certain issues may be submitted to employer and employee representatives for comment pursuant to Section 2(c) of Executive Order 12044 (Improving Government Regulations) which requires that agencies give the public an early and meaningful opportunity to participate in the development of significant regulations.

(b) *Procedure for publication of final issuance.* After the period for public comment has closed, the initiating agency shall then incorporate the changes it deems appropriate and forward to EEOC for review, a copy of the document as published, a copy of the document as amended, with changes highlighted, any staff analysis, and a list of commentors. EEOC or affected agencies may review and copy the comments received. The time needed to review these materials shall be agreed on by the EEOC and the initiating agency. After completion of this review, the initiating agency shall formally submit the proposed final issuance to all affected agencies for at leat 15 working days prior to publication.

§ 1690.305 Nondisclosure or proposed issuances.

(a) In the interest of encouraging full interagency discussion of these matters and expediting the coordination process, the EEOC will not discuss the proposed issuances of other agencies at an open Commission meeting where disclosure of information would be likely to significantly frustrate implementation of a proposed agency action. The

Commission will make this determination on a case by case basis.

(b) Requests by the public for drafts of proposed issuances of another agency will be coordinated, in appropriate circumstances, with that agency and the person submitting the request shall be so notified. The decision made by that agency with respect to such proposed issuances will be honored by the Commission.

§ 1690.306 Formal submission in absence of consultation.

If an initiating agency has an issuance which was already under development on or before July 1, 1978, when Executive Order 12067 became effective, and on which there has been no consultation, the agency shall immediately notify the EEOC of the existence of such proposals and the following procedure shall apply:

(a) EEOC shall confer with the initiating agency and shall determine whether the proposal should be the subject of informal consultation and/or formal submission to other affected Federal agencies pursuant to Section 1-304 of the Order. This does not preclude the right of the agency to consult with any other agency it wishes.

(b) If the EEOC decides that informal consultation and/or formal submission is necessary, it shall confer with the proposing agency and agree on a mutually acceptable length of time for one or both (the informal consultation and/or formal submission).

(c) The period of formal submission shall be sufficient to allow all affected agencies time in which to properly review the proposal. While such period may be longer, in no instance may it be shorter than 15 working days.

§ 1690.307 Temporary waivers.

(a) In the event that the proposed issuance is of *great* length or complexity, the EEOC may, at its discretion, grant a temporary waiver of the requirements contained in § 1690.303 or § 1690.304. Such waivers may be *granted* if: (1) The period of consultation and thorough review required for these documents would be so long as to disrupt normal agency operations; or (2) the initiating agency is issuing a document to meet an immediate statutory deadline; or (3) the initiating agency presents other compelling reasons why interim issuance is essential.

(b) In the event of a waiver, the initiating agency shall clearly indicate that the issuance is interim, has been published pursuant to a wavier, and is subject to review. EEOC reserves the right, after publication, to review the document in light of the objectives of the Order. The initiating agency may make substantive conforming changes in light of comments by EEOC and other affected agencies.

§ 1690.308 Notice of unresolved disputes.

(a) The disputes resolution mechanism in Section 1-307 of the Executive Order should be used only in extraordinary circumstances, and only when further good faith efforts on the part of the EEOC and the agency involved would be ineffective in achieving a resolution of the dispute. Before using the disputes resolution mechanism, the EEOC or the initiating agency must have fully participated in the coordination process, including giving notification to the EEOC and the affected agencies of its intention to publish in final within 15 working days.

(b) EEOC or the affected agency shall then send written notification of the dispute and the reasons for it to the EEOC and to the other affected agencies. Thereafter, but within the 15 day notice period, the EEOC or the affected agency may refer the dispute to the Executive Office of the President. Such reference may be made by the Chair of the EEOC or the head of the Federal agency. If no reference is made within 15 working days, the decision of the agency which initiated the proposed issuance will become effective.

§ 1690.309 Interpretation of the Order.

Subject to the dispute resolution procedures set forth above and in accordance with the objectives set forth in 1-201 and the procedures in 1-303 of the Order, the EEOC shall interpret the meaning and intent of the Order. EEOC also will issue procedural changes under the Order, as appropriate, after advice and consultation with affected agencies as provided for in these procedures.

Subpart D—Reporting Requirements

§ 1690.401 Reporting requirements.

The regulations do not establish reporting requirements other than the required notices of proposed rulemaking and formal and informal review.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

AUG 12 1981

Honorable J. Clay Smith
Acting Chairman
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Chairman:

I am writing to confirm the agreement that our staffs have reached regarding coordination of Executive Orders 12291, 12250, 12067 and the Paperwork Reduction Act of 1980 (P.L. 96-511). The development of complementary procedures for the execution of these Orders and this Act will help ensure that the goals of the Administration are met in a timely manner.

The principal feature of these procedures is that agencies will be required to submit any draft NPRM, final rule, or information collection that is subject to review under Executive Orders 12250, 12067, or the Paperwork Reduction Act to the Department of Justice or EEOC, as appropriate, before the NPRM, rule, or information collection is submitted to OMB under Executive Order 12291 or the Paperwork Reduction Act. After Justice or EEOC has cleared the NPRM, final rule, or information collection, DOJ or EEOC as appropriate, will submit the NPRM, final rule, or information collection to OMB for review under Executive Order 12291 or the Paperwork Reduction Act.

We expect the procedure to work as follows:

1. An agency proposing a draft NPRM, final rule, or information collection subject to Executive Order 12250 or 12067 will submit the proposed issuance to DOJ or EEOC, as appropriate.

2. DOJ and EEOC will perform their respective Executive Order functions, including the resolution of differences between the proposed rule and underlying statutes, case law, related regulations, guidelines and policies, prior to submitting the rule to OMB for review under E.O. 12291 or the Paperwork Reduction Act. Where both DOJ and EEOC have jurisdiction over a draft NPRM, disagreement will be resolved prior to the draft being submitted to OMB or the unresolved issues clearly articulated.

3. DOJ and EEOC shall, as part of their reviews, study and attempt to minimize costs and paperwork requirements. DOJ and EEOC shall ensure that any benefit-cost analysis required by Executive Order 12291 is included in the NPRM or final rule. However, DOJ and EEOC are not required to perform a substantive review of the analysis.

4. DOJ and EEOC, as appropriate, will forward the draft NPRM, final rule, or information collection to OMB. To the extent that both DOJ and EEOC have jurisdiction over a draft NPRM, final rule, or information collection, the entity with primary jurisdiction shall forward it. The sponsoring agency will be required to provide EEOC or Justice supporting documents required by OMB under E.O. 12291 or the Paperwork Reduction Act.

DOJ and EEOC should notify agencies subject to their jurisdiction under Executive Orders 12250 and 12067 of these procedures. The OMB desk officers within the Office of Information and Regulatory Affairs will not accept for review any draft NPRM's, final rules, or information collections that have not been coordinated with DOJ or EEOC under Executive Order 12250 or 12067.

Should you or your staff have any questions, please feel free to call Mr. Nathaniel Scurry, OMB's Assistant Director for Civil Rights on 395-3556.

Sincerely yours,

/s/ James C. Miller III

James C. Miller III
Administrator for Information
and Regulatory Affairs

FEDERAL AGENCY EEO ISSUANCES REVIEWED AND COORDINATED

October 1, 1987 - September 30, 1988
(Issuances are regulations unless otherwise noted)

DEPARTMENT OF EDUCATION

- Nondiscrimination on the Basis of Sex in Assisted Education Programs (Title IX)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

- Regulations Implementing Section 504 of the Rehabilitation Act in the Commission's Federally Conducted Programs
- Proposed Policy Guidance on the Effect of IRCA on Remedies Available to Undocumented Aliens Under Title VII
- Booklets for employers and employees on national origin discrimination and the 1986 Immigration Act
- Regulations Implementing Section 504 of the Rehabilitation Act in the Commission's Federally Conducted Programs
- EEO-6 Report

Policy Guidance

- Policy Statement on the Coverage of Sheriff's Deputies Under Title VII and ADEA
- Specific Exemptions from Coverage Pursuant to § 9 of the ADEA of 1967, as Amended. Activities and Programs Under Federal Contracts of Grants, as Carried Out by the Several States, Designed Exclusively for Individuals With Special Employment Problems as Set Forth in § 1627.16 of the Commissions Regulations
- Policy Statement on Differences in the Payment of Reimbursable Expenses for Travel
- "New Age" Training Programs Which Conflict With Employees' Religious Beliefs
- Application of § 4(f)(2) of the ADEA of 1967, as Amended, to Cases Involving "Benefit Packages" that End Life Insurance Coverage for Employees Totally Disabled After Attaining Age 60
- Effect of 1986 Amendment to ADEA on Commission's Enforcement Activities

- Application of § 4(g) of the ADEA of 1967, as amended, (Coverage of Older Workers Under Group Health Plans)

- Indian Preference Under Title VII

- Policy Statement on Religious Accommodation of Union Dues Objectors to Unionism

- Preferential Treatment Based on Age

- Effect on Unions and Employment Agencies of Title VII Coverage of the Employers With Whom They Deal

- Modification of Policy Statement on Cases Raising the Issue of Whether Benefits for Pregnancy, Maternity, or Abortions are Wages

- Equal Pay Act Cases Involving Sports Coaches

- Application of Title VII to American Companies Overseas, Their Subsidiaries, and to Foreign Companies

GENERAL ACCOUNTING OFFICE

- Survey of State and Local Human Rights Agencies on Immigration-related employment practices

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

- Proposed Section 504 Interim Compliance Manual

- Proposed Section 504 Regulation for federally assisted programs and activities

DEPARTMENT OF JUSTICE

<u>Office of the Special Counsel for Immigration-Related Unfair Employment Practices</u>

- Proposed Interim Final Rule amending 8 C. F. R. § 44.101(c)(2)(ii) pertaining to Unfair Immigration Related Employment Practices

- Memorandum of Understanding on Processing Immigration-Related Discrimination Complaints

DEPARTMENT OF LABOR

- Office of Federal Contract Compliance Programs Directive on Corporate Level Selection Decisions

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

- Nondiscrimination on the Basis of Sex in Assisted Education Programs (Title IX)

OFFICE OF MANAGEMENT AND BUDGET

- Revised Guidelines for Federal Statistical Activities

OFFICE OF PERSONNEL MANAGEMENT

- Regulations on Medical Qualification Determinations
- FPM Chapter 339: Medical Qualification Determinations
- FPM Chapter 335: Promotion and Internal Placement

Review of Agency Regulations Implementing Section 504 of the Rehabilitation Act in Federally Conducted Programs

Department of Agriculture

Department of Commerce

Railroad Retirement Board

(Proposed Rule issued jointly by the following agencies)

African Development Foundation

Executive Office of the President

Federal Emergency Management Agency

Federal Labor Relations Authority

Merit Systems Protection Board

National Aeronautics and Space Administration

National Archives and Records Administration

National Labor Relations Board

Office of Personnel Management

Office of the Special Counsel (MSPB)

Overseas Private Investment Corporation

Securities and Exchange Commission

Veterans Administration

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